



COUNCIL AGENDA: 03-17-09
ITEM: 7.2

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Lee Price, MMC
City Clerk

**SUBJECT: COMMERCIAL SOLID WASTE
SYSTEM REDESIGN**

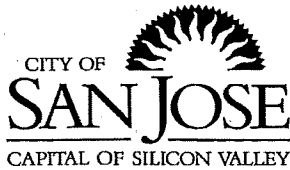
DATE: 03-05-09

RECOMMENDATION

For Council consideration as discussed by the Transportation and Environment Committee on March 2, 2009 and outlined in the attached memo previously submitted to the Transportation and Environment Committee:

- (a) Approve development of a Request for Proposals to solicit and award an exclusive franchisee to collect and process commercial solid waste, recyclables and organic materials for each of the two service districts for an initial term of ten years with two options to extend the term, the first for three years and the second for two years for a total of five years;
- (b) Include living wage and employee retention requirements in the Request for Proposals; and
- (c) Direction to amend the City's Living Wage Policy to include exclusive commercial solid waste franchise services.





T&E AGENDA: 02-02-09

ITEM: d.

Memorandum

TO: TRANSPORTATION AND
ENVIRONMENT COMMITTEE

FROM: John Stufflebean

SUBJECT: COMMERCIAL SOLID
WASTE SYSTEM REDESIGN

DATE: 01-20-09

Approved

Date

1/21/09

RECOMMENDATIONS

Recommend that the following be placed on the February 17, 2009, Council Agenda for discussion, with the following recommendations:

1. Approve developing a Request for Proposals to solicit and award an exclusive franchisee to collect and process commercial solid waste, recyclables, and organic materials for each of the two service districts for an initial term of ten years with two options to extend the term, the first for three years and the second for two years for a total of five years.
2. Include living wage and employee retention requirements in the Request for Proposals.
3. Direction to amend the City's Living Wage Policy to include exclusive commercial solid waste franchise services.

OUTCOME

Approval of the recommendations would dramatically increase recycling and waste diversion in San José consistent with the Zero Waste Goal of meeting 75% diversion by 2013, and Green Vision Goal #5 of diverting 100% of waste from our landfills. The recommendations would encourage private sector development of additional material recycling capacity, the creation of green jobs, and support Green Vision #3 by creating feedstock for potential energy conversion technologies. In addition, the recommendations would provide San José businesses with expanded and more efficient recycling collection services and stabilize General Fund revenues. This effort could also promote green fleet goals by requiring the collection companies to use vehicles that meet more stringent current emissions standards.

BACKGROUND

In 1995, the City adopted a non-exclusive franchise system for the collection of mixed recyclables, organics and garbage from the commercial sector. The commercial sector includes all commercial, industrial, and institutional waste generators. Franchised haulers pay Commercial Solid Waste Franchise Fees to the City based on the volume of garbage collected and businesses pay a Source Reduction and Recycling (AB939) fee to fund City integrated waste management programs.

In the non-exclusive system, multiple solid waste haulers possessing Commercial Solid Waste and Recyclables Collection Franchises compete with each other on a customer-by-customer basis to provide collection services. The services rates vary because the haulers may establish rates unilaterally or negotiate the rates with their customers. Oversight under the current commercial system is challenging due to the number of haulers and limitations of the current franchise agreements. Moreover, the haulers may operate with overlapping routes and dispose of or process the waste in facilities outside of the South Bay, which compounds transportation-related environmental impacts such as air emissions, traffic congestion, and noise.

In order to meet the Zero Waste Goals, it was imperative that the City evaluate the current solid waste systems, starting with the commercial sector. On December 3, 2007, staff presented the "Commercial Redesign White Paper" prepared by HF&H Consultants, to the Transportation and Environment (T&E) Committee. The key findings were:

- Significant opportunities exist to increase diversion of materials from the commercial waste stream;
- More efficient citywide service delivery models could improve economies of scale and reduce the environmental impact of the commercial collection system, including greenhouse gas emissions;
- Recycling services available to most customers are limited in the current system;
- Customer service and hauler compliance with franchise agreements and municipal code provisions are inconsistent and difficult to enforce in the current system; and
- Customer rates vary significantly for the same level of service, creating opportunities to provide rate equity among customers and to provide economic incentives for waste diversion.

In March 2008, Cascadia Consulting Group conducted a waste characterization study for the City. The study involved sorting commercial solid waste into nearly 60 categories to identify the types and quantities of waste being sent to the landfill. The study determined that 79% of business waste that is currently being disposed of in landfills is recyclable or compostable.

On September 16, 2008, the Council approved redesigning the commercial system to an exclusive franchise system with two or three waste hauling companies providing waste and recycling collection services in specified geographic areas of the city. The scope of the system,

with certain exemptions, would include collection of solid waste, recyclables, and organics in carts, front-load bins, roll-off boxes, and compactors.

ANALYSIS

Council's direction on the recommendations in this report would establish the framework for a Request for Proposals (RFP) for Commercial Solid Waste collection and processing services. In developing the recommendations, staff balanced several considerations, including cost control, service reliability, recycling options for businesses, environmental leadership, and General Fund revenue stability. The recommended term and scope seek to achieve the lowest service cost without sacrificing system flexibility or proposer innovation.

Revenue Considerations

Currently two sources of General Fund revenue, the Commercial Solid Waste Franchise Fee and the Disposal Facility Tax, are based on the amount of materials going to landfill; these sources are expected to generate approximately \$23 million to the General Fund in 2008-2009. Under the existing system, reducing the amount of commercial waste disposed in San José effectively reduces the revenue that the City receives from the disposal of the waste. The Zero Waste Strategic Plan presented to Council on December 16, 2008 includes a review of alternate funding sources for the General Fund. The recommended exclusive collection system would offer the greatest flexibility to implement alternatives to the current revenue structure.

Impact on Current Waste Haulers

One of the major considerations in the change to an exclusive system is any impact this change may have on small businesses in San José who currently provide garbage or recycling service. The commercial redesign will primarily affect the four commercial haulers providing regular front-load garbage and recycling collection services to the commercial sector: Allied Waste, Stevens Creek Disposal and Recycling, GreenWaste Recovery, and GreenTeam of San Jose (dba GT Waste). All of these haulers have operations outside of San José: Allied Waste (recently merged with Republic Services) is the second-largest publicly traded waste services company in the nation with operations in 40 states; Stevens Creek Disposal is a subsidiary of Norcal Waste Systems, the largest privately held waste hauler in the United States, with operations throughout Northern California; privately-owned GreenWaste Recovery possesses collection agreements in several Bay Area cities, including Petaluma and Palo Alto; GreenTeam is owned by Waste Connections, the fifth-largest publicly-traded waste company in the nation with operations in 23 states.

In addition, two of these haulers have significant residential solid waste service contracts with the City. GreenTeam provides residential collection services to some single-family and all multi-family households in San José and provides City facilities collection services, and will be compensated about \$22.6 million in 2008-2009. GreenWaste Recovery will be compensated approximately \$23.8 million in 2008-2009 for provision of City residential yard trimmings collection services and other recycling services. The City also compensates Allied Waste

approximately \$8 million per year to provide disposal services through an agreement which terminates in the early 2020's.

The recommended commercial redesign would have no impact on the 19 haulers in San José that provide construction and demolition collection activities exclusively. Council approved a budget proposal for 2008-2009 to evaluate this temporary waste hauling service. In fall 2009 staff will bring forward for Council consideration recommendations to increase recycling and to improve other components of the temporary waste hauling sector (which includes construction and demolition waste) as a separate initiative from the commercial solid waste system redesign project.

Jobs/Small Business Development

Increasing the recycling rates in the commercial sector will create more recycling-related jobs. According to the California Integrated Waste Management Board, only 2.5 jobs are created per 1000 tons landfilled, while almost five jobs (direct and indirect) are created per 1000 tons recycled. Recent local experience confirms that recycling creates jobs: the San José facility that processes the 62,000 tons of garbage annually from San José multi-family households and City facilities directly employs 99 workers on the sort line handling this material. The commercial system redesign provides an opportunity to create an estimated 200 additional jobs from the processing and recycling of a large percentage the 240,000 tons of garbage that is currently landfilled from San José businesses annually.

In addition, the commercial solid waste system RFP process would provide several opportunities for proposers to partner with small businesses. Some of the potential subcontracting opportunities could include recycling technical assistance; communications, marketing, and outreach to customers; garbage and recycling container delivery/distribution; and tire repair services.

Finally, staff intends to procure recycling technical assistance services to assist businesses in the transition to the new service, to augment the franchisees' technical assistance efforts and to help staff monitor the effectiveness of technical assistance to businesses citywide. The City plans to conduct a procurement for these services in late 2010, which will provide an opportunity for local business with an expertise in recycling technical assistance in San José to propose.

Support Compliance with California Regulations

In December 2008 the California Air Resources Board adopted the AB 32 Scoping Plan, the official blueprint for implementing the California Global Warming Solutions Act of 2006 (AB32), the landmark state legislation aimed at mitigating climate change. The adopted AB 32 Scoping Plan includes mandatory commercial recycling at all businesses in California and encourages diversion of organics from landfills through composting and anaerobic digestion. The commercial system redesign provides the best opportunity for the City and its businesses to meet these requirements by providing effective and efficient recycling solutions to San José's commercial sector and by implementing comprehensive commercial organics diversion programs.

In addition, legislation (SB 1390) was introduced in the 2007-2008 session of the California State Senate that would have set a statewide diversion goal of 75%, and would have required recycling at commercial businesses statewide. Although this legislation failed, staff anticipates that it will be reintroduced in the upcoming legislative cycle, and there is support among environmental groups, waste haulers, and local governments for implementation of mandatory commercial recycling requirements. The redesign positions the City to be able to comply with any future State actions related to this legislation.

Outreach

Staff has continued its on-going outreach efforts since Council direction in September to proceed with development of the new commercial system. Staff presented an update on the commercial redesign to the Redevelopment Agency's Neighborhood Business District Presidents' meeting in October 2008, and follow-up calls were made to each of the neighborhood business districts offering presentations at their membership meetings. Staff met with the Evergreen Business and Professional Association and has several meetings with additional business associations scheduled for January. In October 2008, staff made a presentation at a property managers meeting at CB Richard Ellis, a large local property management company.

Direct mail updates were sent to the 20,000 businesses in the City's business tax database in November. Several dozen responses were received, primarily from small businesses in favor of efforts to make recycling easier. A recycling seminar was hosted by the San Jose Silicon Valley Chamber of Commerce in November; businesses that attended favored the new commercial system and several expressed an interest in implementing the changes as quickly as possible. Staff has continued to offer presentations and other engagement opportunities to the Silicon Valley Leadership Group, Sustainable Silicon Valley, and local ethnic chambers of commerce. The Leadership Group offered to provide support for the commercial redesign process (Attachment C). Staff is also working with several Councilmember offices to schedule meetings with businesses to provide information on the changes to the commercial system.

Environmental Leadership

In an effort to retain San Jose's role as an environmental leader, staff feels that there is a need for changes in the commercial system as laid out in the proposed scope of services. Many other local communities have higher diversion and technical assistance standards for their commercial sectors that can only be accomplished in an exclusive franchise system. Additionally, several recent procurements that have a common zero waste goal focus on commercial infrastructure. For example the City of Palo Alto's Zero Waste Operational Plan included significant enhancements in their commercial programs. As a result Palo Alto recently awarded their solid waste, organics, and recyclables collection and processing to a new contractor under a new agreement that requires enhanced services to businesses. In the Cities of Oakland and Hayward, the franchised hauler is rolling out an innovative wet/dry collection program in order to recover as much material as possible from the garbage stream. These collaborative initiatives are much easier accomplished in a system like the one being proposed.

Franchise Scope of Services

The scope of the franchise would include, with certain exceptions, the exclusive right to provide garbage, recyclables, and organics collection services to commercial generators within an assigned service district. The collection services would include a variety of container options including carts, front-load bins, roll-off boxes, and compactors. The RFP scope would give the City the flexibility to process organic materials and recycling residue for innovative uses, such as converting organic waste into renewable energy. The RFP would exclude Construction and Demolition (C&D) waste. Additional exceptions to the exclusive system are detailed in Attachment A.

The RFP would solicit proposals for the following three options for collecting waste from the commercial sector:

1. A three-container system for single-stream recycling (recyclables combined in the same container), clean organics (food, food contaminated paper and yard trimmings for composting), and garbage;
2. A two-container system, for wet, organic material (for composting) and dry material (commingled recyclables and residual waste combined together for processing to capture the recyclables); and
3. In addition to Options #1 and #2 above, an optional, alternative collection system, allowing the proposer to offer an innovative approach to accomplish the RFP services and performance standards.

The RFP would combine collection and recyclables processing services under a single franchise for each district. Under this model, each franchisee would be responsible for meeting collection and processing waste diversion requirements. The franchisee must meet performance standards for all aspects of the service, and report program data and information to the City. The RFP would require detailed descriptions for how the proposer would process collected materials (e.g. single-stream recyclables in Option 1, or dry material in Option 2); meet minimum standards for equipment through-put and material recovery efficiency (i.e. diversion); and maintain the quality of the processed material. Proposers would be required to include comprehensive plans for marketing each type of recovered material under current and anticipated markets, and to demonstrate availability of contingency recyclables processing capacity. The following are some advantages to combining collection and processing in this way:

1. For each district, one company would be responsible for meeting performance standards such as waste diversion goals.
2. Based on experience in San José and other jurisdictions throughout the Bay Area, it is difficult for a jurisdiction to directly require a recyclables processing company to achieve waste diversion goals when that processor cannot control the contamination levels of the recyclables it receives. Moreover, the City could be asked to resolve disputes between the collector and processor.
3. Ongoing City administrative costs and risks would be reduced, as the number of contractual parties is minimized, because the franchisee would be responsible for paying all affiliates and subcontractors.

San José must compete with jurisdictions throughout the Bay Area for access to composting facilities. Currently, three large Bay Area counties are actively seeking additional capacity and evaluating South Bay facilities for meeting their organics recycling needs. Staff anticipates that since the capacity to process organics is limited, potential proposers to the RFP could be limited. In order to secure sufficient organics processing services, staff intends to reserve capacity either through this RFP process or as a separate procurement to offer to successful proposers. If the City can offer organics processing to potential proposers, more companies would be able to compete in the RFP process. Moreover, the City can make the organic material available for multiple uses such as compost, digester feedstock, gasification, or other energy conversion technologies.

To help control disposal costs, the City would offer access to disposal capacity under the City's existing disposal agreement with International Disposal Corporation at the Newby Island Landfill. This option would allow successful proposers to take disposed materials (garbage and recycling processing residue) to Newby Island at the City's negotiated rate to the extent allowed under the City's disposal agreement.

The selected proposers would provide all billing and customer service functions. The City would establish the service rate based on proposal costs, fees to achieve General Fund revenue requirements, rate equity considerations, and strategies for encouraging waste reduction. The rate structure would be designed to the extent practicable to minimize the initial rate increases to businesses and provide rate stability throughout the term of the franchises. The franchisees would remit to the City payment for the cost of disposal, fees, and any performance incentive/disincentive payments. The franchisees would be responsible for paying directly for all services provided by their affiliates and subcontractors.

For the first two years, staff recommends fixing the compensation under the franchise, with the exception of an inflationary increase. After the second year, the City plans to perform a comprehensive rate review to adjust for actual costs. This approach is consistent with standard compensation methodology used in exclusive solid waste franchise agreements throughout the Bay Area and Northern California. It is important to perform a rate review in a new collection system for several reasons. There are uncertainties inherent in moving from a non-exclusive to an exclusive system, and the 18 to 24 month gap between proposal submission and service implementation would likely result in changes to cost and service assumptions such as fuel costs, number of routes needed, material tonnages, and the revenue from the sale of recyclable materials. A rate review would mitigate the proposers' up-front risk, lowering proposal costs, and assure ratepayers and the City that the service will be reasonably priced.

Term of Franchise

In order to minimize impact on customer rates, staff recommends a longer term to mitigate up-front capital expenses. The term of the franchise would be ten years, with two extension options, the first for three years and the second for two years, up to a total of five years. Collection franchises generally have base terms of seven to ten years to control costs, as this term corresponds to the period required to fully amortize new capital equipment such as trucks. In

addition, longer terms allow for more financial certainty, and encourage investment in equipment and facilities. Offering potential extensions, even if they are awarded at the City's sole discretion, help motivate high-quality performance during the term of the franchise.

Performance Standards

Performance standards would ensure franchisee accountability and promote consistent, high quality, reliable and courteous service to businesses. Staff recommends financial incentives and disincentives tied to the following performance standards:

- Customer service
 - Call center responsiveness
 - Telephone hold times
 - City access to customer-specific account information
- Diversion
 - 75% minimum diversion rate
 - Options for increasing diversion targets
- Service delivery
 - Push service for bins
 - Close doors of enclosures after service
 - Functional container lids
 - Leak proof containers as appropriate
 - Container swaps and deliveries
 - Missed pickups
 - Timely recovery of service failures
 - Container cleaning
- Environmental compliance
 - Litter control
 - Spill clean-up
 - Container aesthetics
- Vehicle standards
 - Cleaning and maintenance
 - Emission controls
 - Alternative fuels
 - GPS
- Technical Assistance (see below)

Technical Assistance

Effective technical assistance would facilitate the City's waste diversion goals, and will be a key component of the RFP. Technical assistance includes education, outreach, and recycling assistance activities that help drive business recycling practices. The RFP would request a detailed plan for how the proposers would provide comprehensive technical assistance to the commercial sector.

Proposers would be required to create a marketing plan detailing a sales strategy for increasing recycling rates for targeted businesses or industries, associated goals and performance targets,

the number of staff dedicated to technical assistance, and employee incentives for achieving performance targets. The City would require the proposer to coordinate with City staff on public education efforts, analyze the waste stream at specific businesses to identify recyclable materials, provide assistance to businesses in setting up recycling programs, provide employee education, and resolve recycling contamination issues. The technical assistance requirement could provide an opportunity for proposers to leverage small business partners in providing this service to the commercial sector. Staff is also planning to procure recycling assistance services to augment the franchisees' technical assistance efforts, which also provides an opportunity for small business involvement in recycling technical assistance.

Collection Districts

Staff engaged HF&H Consultants and San José State University urban planning graduate students to analyze and develop clearly defined (e.g. along key transportation arteries) collection districts based on customer account data from the current haulers, information from the City's business tax database, estimated waste generation rates, and San José's geographical layout.

Staff evaluated the creation of up to four collection districts, and determined that two collection districts offered the best opportunity to maximize economies of scale in order control the impact on ratepayer costs. Two equivalent districts (balancing number of customers, route hours, and expected waste disposal levels in each district) allow for the maximization of collection route efficiencies. Two districts also allow the City to compare performance between franchisees, creating a sense of competition to help drive high performance, and offer the capability to use one service provider as a back-up in an emergency. Creating additional service districts erodes collection route efficiencies, increasing costs and environmental impacts by requiring additional collection vehicles to the roads.

Wage Policies

If the City adopts an exclusive franchise system, with limited exceptions, only two companies would provide solid waste collection services to businesses in the City. Other franchises in the City are not exclusive. With limited providers, the City has a public interest in ensuring that solid waste service, a mandatory and basic public health and safety requirement, will not be interrupted and that qualified employees provide this vital service. Moreover, the workers providing commensurate services on behalf of the City to the residential sector, including truck drivers, material recover facility and customer service employees, are paid at least a living wage.

The commercial solid waste franchises will be more closely regulated than other City franchised services because of the City's reliance on the exclusive system to meet aggressive Green Vision and Zero Waste goals. Specifically, the proposed new system will require franchisees to achieve specified waste diversion levels through services and programs prescribed by the City in this RFP process, and delivery of these services and programs will require more labor-intensive processes, especially for recyclables collection, than the existing system. In addition, franchisees will be required to meet City-established performance requirements for service delivery, both in the types of service provided and the standards for customer service, develop and implement a

strategy for providing recycling technical assistance, and regularly report to the City service and diversion performance metrics.

In consideration of this, staff recommends requiring living wage and worker retention in the RFP for exclusive commercial solid waste franchisees. The living wage could be applied to all employees of the successful proposer including drivers, mechanics, recyclables processing facility workers, and customer service representatives. Requiring living wage and worker retention will ensure that experienced, qualified workers are employed in solid waste collection and processing functions.

Expanding the living wage to solid waste service employees could increase the cost of services. Based on information provided by two of the City's largest commercial haulers, staff estimates that at current wage rates and staffing levels, the impact of living wage could result in an approximately 15% increase to base pay rates of recycling sorters. Extending the living wage would have minimal impact on other employees, such as collection drivers, because most of these employees are already receiving wages equivalent to or higher than the City's living wage. Several local garbage and recycling collection and processing service providers have indicated that they could accommodate a living wage requirement in this RFP process.

Currently, the City's Living Wage Policy specifically excludes franchises. If Council adopts a living wage requirement in the RFP, staff must first return to Council to amend the Living Wage Policy in 2009.

Transition

Once the City has awarded the exclusive franchises to the successful proposers, the Administration would implement a transition plan to switch from the current non-exclusive system to the new service providers. The 18 to 24 month time period between the award of the new franchises and new program implementation should be sufficient time for the successful proposers to secure a corporation yard, and procure collection vehicles and other equipment. This period will also be an opportunity for City and the successful proposers to work together to ensure a smooth transition. Due to multiple recent program changes in San José's residential Recycle Plus program, staff is uniquely qualified and experienced to manage large scale solid waste service transitions. Additionally, staff has compiled an inventory of other jurisdictions that have made similar changes to their commercial solid waste systems, allowing staff to develop best practices from the experience of other jurisdictions.

RFP Evaluation

An evaluation panel will be created for proposal evaluation, comprised of City technical and management personnel, and members of the business community. Staff will work with stakeholder groups such as the San Jose Silicon Valley Chamber of Commerce and the Silicon Valley Leadership Group to identify appropriate business sector panelists. The following are the preliminary criteria the panel would use in its evaluation process.

Company's Qualifications and Experience (Estimated weight: 25%)

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Collection experience, service initiation experience, management and customer service systems, key personnel qualifications, past performance record, financial stability, and references.

Technical Proposal (Estimated weight: 35%)

Collection Services: Collection approach, diversion ability, public education and promotion program, technical assistance plan, billing system, facilities for equipment, maintenance, and administration, implementation plan, potential collection impacts, other proposed services, collection contingency plans.

Processing Services: Processing approach, diversion ability, facilities and equipment, quality assurance, recyclable material marketing plans, processing contingency plans.

Optional Innovation-Based Collection Proposal: Reasonableness and reliability of proposed collection methods, technology, equipment, and containers; reasonableness of productivity and operating assumptions; waste diversion impact, environmental benefits to the community, customers' quality of service.

Environmental Enhancements: Supports the goals of the Green Vision; this could include low emissions and/or alternative fuel collection trucks; the creation of green jobs; and/or facilities that have LEED certification.

Cost Proposal (Estimated weight: 30%)

Reasonableness and competitiveness of cost proposals.

Local Business Preference (Estimated weight: 5%)

Small Businesses Preference (Estimated weight: 5%)

EVALUATION AND FOLLOW-UP

If Council approves the recommendations, the RFP is scheduled to be released in late spring/early summer 2009. After completion of the RFP process, staff will present Council with recommendations to award franchises to successful proposers in summer 2010. Implementation of the new franchises is scheduled for 2012.

PUBLIC OUTREACH/INTEREST

Criterion 3 is applicable.



Criteria 1: Requires Council action on the use of public funds equal to \$1 million or greater.

(Required: Website Posting)

- ☐ **Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- ✓ **Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

Staff has conducted an extensive outreach engagement process since January 2008. These efforts included in-person interviews, presentations, media outreach, and an on-line survey. The outreach was conducted in partnership with the Office of Economic Development, the Department of Planning, Building and Code Enforcement, the San José Redevelopment Agency, existing commercial haulers, individual businesses, and business associations. Staff engaged business districts and associations, chambers of commerce, business and non-profit leadership groups, and others during the process.

Since September 16, 2008, when Council directed staff to proceed with new system development, staff has continued its outreach efforts. On-going efforts to inform the business community of the commercial system redesign have included updates mailed to the 20,000 businesses in the City's business tax database, on-going meetings with current commercial haulers, a presentation at the Chamber of Commerce, and contacts with each of the neighborhood business districts, Silicon Valley Leadership Group, and Sustainable Silicon Valley. See Attachment B for a detailed description of the stakeholder engagement process.

COORDINATION

This memo has been coordinated with the Department of Planning, Building, and Code Enforcement, the Finance Department, the Office of Equality Assurance, the Office of Economic Development, the City Attorney's Office, and City Manager's Budget Office.

COST SUMMARY/IMPLICATIONS

Staff anticipates submitting a one-time budget proposal for Council consideration during the 2009-2010 budget process for costs related to proposer selection and service transition.

CEQA

CEQA; Exempt File No. PP08-247

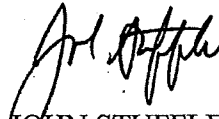
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Council's approval of staff the recommendations in this memo are Categorically Exempt from CEQA. Once specific components of the new commercial system are being drafted for Council consideration, it will be subject to CEQA review. Staff will return with the necessary environmental review as part of the proposer recommendation process for Council consideration.



JOHN STUFFLEBEAN
Director, Environmental Services

Attachments:

- A. Exclusions from Scope of Exclusive Collection System
- B. Stakeholder Engagement Process
- C. Letter of Support – Silicon Valley Leadership Group

For questions, please contact Jo Zientek, Deputy Director, Integrated Waste Management Division, at 408-535-8557.

Attachment A
Exceptions to Scope of Exclusive Collection System

Customer Types

- Small businesses included in Recycle Plus residential program
- Mixed use developments included in the Recycle Plus residential program that are primarily residential and combine their residential and commercial wastes
- City facilities, multi-family, and single-family dwellings which are currently covered under existing exclusive agreements whose contract terms extend past the proposed timeline
- Agencies that are legally exempt from exclusive franchise agreements

Material Types

- Construction and Demolition (C&D) Debris
- Temporary Residential Clean-outs
- Specialty recyclables not diverted through the City's program
- Recyclable material for which the generator (business) is compensated
- Self-hauled waste
- Donated materials
- Organic materials composted on-site
- Sewage treatment by-product (sludge)
- Hazardous Waste (including universal waste)
- Infectious, Toxic, Medical, Radioactive Waste
- Tallow, Fats, Oils, Grease
- E-Waste
- Secure document shredding
- Composting on site
- Inerts (Dirt, Rock, Concrete, Sand)
- Spent grains
- Gypsum/Wallboard
- Rubber/Tires

Attachment B

Stakeholder Engagement Process

Staff has conducted an extensive outreach engagement process since January 2008. These efforts include in-person interviews, presentations, media outreach, and an on-line survey. Staff has engaged with business districts and associations, chambers of commerce, business and non-profit leadership groups, and others during this process. Outreach is conducted in partnership with the Office of Economic Development, the Department of Planning, Building and Code Enforcement, the San José Redevelopment Agency, existing commercial haulers, individual businesses, and business associations.

The outreach campaign consists of two phases. The goal of phase one was to gather information that would assist staff in evaluating system options. A business recycling survey was distributed in spring 2008 to obtain feedback from customers and stakeholders. More than 500 businesses completed the survey. Additionally, staff conducted twenty-two in-person/case study interviews with businesses and the haulers industry. This primary research yielded input from a wide representation of businesses including non-profits, schools, and churches. Information about current business recycling programs, barriers to recycling, and input on potential changes to the collection system was collected.

The goal of phase two outreach efforts, completed between June and July 2008, focused on communicating to the business community and haulers the results of the survey and staff recommendations for a geographic district-based exclusive commercial system. Staff presented at various business groups, including the Silicon Valley Leadership Group Environmental Committee, Joint Venture Silicon Valley, the Silicon Valley Chamber of Commerce, and the Construction Roundtable. Staff also held individual meetings with businesses that had expressed concerns about an exclusive system as well as with each of the interested franchised haulers.

Phase One – Proposal Research

Online Survey – An online survey on the City's Environmental Services webpage was made available during the period of February 8 to April 17, 2008. More than 500 business customers responded to the survey. This survey was advertised through a multi-lingual direct mail postcard sent to 20,000 businesses and advertisements in the San José Business Journal. In addition, over 25 business associations were personally invited to participate in the survey.

Presentations – City staff provided a presentation to explain the evaluation process and provide an opportunity for feedback on the current garbage and recycling system to multiple business and industry organizations.

Case Study Interviews – Staff conducted twenty-two individual interviews with facility managers or other representatives from the following industries: Restaurants, Hotels, Retail, Office, High Tech, Entertainment, Education and Health Care.

Hauling Industry – Staff also engaged with the current franchised haulers for input on the current system, barriers to increased recycling, and reaction to the redesign options. The four largest haulers, with 90% of the commercial accounts, as well as other interested haulers took part in case-study interviews and completed a survey. Staff also conducted an information meeting for all haulers that included an overview of the current system, the Zero Waste and Green Vision goals, and a summary of the commercial evaluation process.

Phase Two – Proposal Evaluation

This phase was focused on educating businesses about the evaluation process, the benefits of an exclusive system, and addressing concerns identified in the survey process.

Presentations – Staff presented the survey results and proposed recommendations to the Silicon Valley Leadership Group, Joint Venture Silicon Valley, Silicon Valley Chamber of Commerce, and the Construction Roundtable.

One-on-One Interviews – Staff conducted follow-up conversations with businesses that expressed concern during the first phase of outreach.

These businesses were presented with data from the waste characterization study and the survey results. The information gave them a general understanding of the City's desire to pursue an exclusive system. Many of the businesses initially opposed to the idea of an exclusive system were more supportive after receiving the data, survey information, and learning about benefits the new system could provide.

When presented with the proposed concept of a district-based exclusive system, the four largest haulers and some of the smaller haulers were supportive of the concept. The smaller haulers who mostly deal with drop box and/or Construction and Demolition (C&D) debris were generally opposed to an exclusive system that included C&D collection because it would likely eliminate their ability to do business in San José. As a result, staff re-evaluated the proposal and C&D collection are no longer included. All of the haulers expressed an interest in the City procuring processing capacity to allow more haulers the ability to compete in the selection process. Many also requested that the City procure disposal capacity.

On-Going Outreach

Since September 16, 2008, when Council directed staff to proceed with new system development, staff has continued its outreach efforts. On-going education efforts include:

- Regular direct mail updates to the 20,000 businesses in the City's business tax database
- Regular electronic updates to over 200 businesses who have signed up for e-mail updates
- On-going meetings with the current commercial haulers and recycling industry professionals to help develop the scope and requirements of the RFP,
- Presentations to business groups and organizations including:
 - Seminar hosted by the San Jose Silicon Valley Chamber of Commerce
 - Neighborhood Business District Presidents' meeting held by SJRA
 - Event booths at BusinessOwnerSpace.com/Hispanic Chamber of Commerce and West Coast Green Conference
 - Presentations to property management companies
- Contacts with each of the neighborhood business districts, Silicon Valley Leadership Group, and Sustainable Silicon Valley



Attachment C
Letter of Support- Silicon Valley Leadership Group

224 Airport Parkway, Suite 620
San Jose, California 95110
(408) 501-7864 Fax (408) 501-7861
<http://www.svlgn.net>

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SunPower

KENNETH WILCOX
SVB Financial Group

Working Council Chair
VICTOR ARRANAGA, JR.
Applied Materials

Established in 1978 by
DAVID PACKARD

August 1, 2008

The Honorable Chuck Reed
200 East Santa Clara Street
San Jose, CA 95113

Re: Support for San Jose Commercial Garbage and Recycling

Dear Mayor Reed:

The Silicon Valley Leadership Group is pleased to offer our support for the City's efforts to expand commercial recycling across San Jose. Earlier this month, Christine Wolter from the Environmental Services Department briefed our Environment Committee. We were inspired to hear of the City's leadership in the area of recycling.

Recognizing that the commercial sector generates a majority of the City's waste, approximately 75 percent, totaling more than 1.4 million tons annually, the Leadership Group is delighted to support San Jose's efforts to boost commercial recycling.

Founded in 1978 by David Packard of Hewlett-Packard, the Leadership Group has a distinguished thirty-year history of linking the public and private sector to the mutual benefit of Silicon Valley businesses and residents. Our 270 members collectively provide nearly 250,000 local jobs, or one of every four private sector jobs in Silicon Valley. Given this strong presence, we are happy to work with our members to promote increased business recycling and measurably reduce the amount of commercially generated waste.

The Leadership Group supports a redesign of the commercial solid waste system that makes recycling an easy and instinctive choice for not just San Jose businesses, but businesses across the Valley. Improving commercial recycling, we believe, represents a sound investment in our region's economic vitality and the overall health of our planet.

As the City continues to move forward with its recycling system redesign, we look forward to partnering with the City to create policy solutions that work to the benefit of our members and region as a whole.

Sincerely,

Mike Mielke
Director, Environmental Programs

cc: Forrest Williams, Chair, Transportation & Environment Committee
San Jose City Council



Memorandum

TO: TRANSPORTATION AND
ENVIRONMENT COMMITTEE

FROM: Richard Doyle
City Attorney

SUBJECT: Commercial Solid Waste
Franchise Wage Policies

DATE: January 22, 2009

BACKGROUND AND INTRODUCTION

On September 16, 2008, the City Council directed the City Attorney's Office to evaluate the feasibility of requiring prevailing wage and worker retention in the Request for Proposals ("RFP") for exclusive commercial solid waste service franchisees.

This Office recommends against including a prevailing wage requirement in the RFP because prevailing wage requirements are usually imposed when the City is acting in a market participant capacity. Since the City would not be acting as a market participant but rather will act in its regulatory capacity with regard to the franchisees, imposing a prevailing wage requirement could be challenged on the basis of preemption under the National Labor Relations Act ("NLRA"). On the other hand, the City has imposed living wage requirement when it acted in a regulatory capacity; consequently, requiring franchisees to pay workers a living wage would not be subject to the same legal challenge. Accordingly, a living wage requirement could be included in the RFP.

The City's authority to include worker retention requirements in the RFP is unclear. Worker retention requirements have been upheld in two other jurisdictions; however, the federal courts within the Ninth Circuit have not decided this issue.

DISCUSSION

I. Prevailing Wage

"Prevailing wages" are the hourly wage rates that are established for the various workers within each of the various trades, occupations and classifications of work on a project. They are reflective of local wage conditions in that they are the wage rates that "prevail" within a given geographic area for particular classifications of work. Often times, the prevailing wage is the wage established by a collective bargaining agreement. Under case law, the City's authority to impose prevailing wages depends on whether it is acting as a "market participant" or in its regulatory capacity.

A. Market participant versus regulator

Preemption by the NLRA is limited to state or local government labor regulation and not all legitimate state or local activity that affects labor. This distinction was applied by the U.S. Supreme Court when it found the City of Los Angeles could not require the resolution of a labor strike as a condition for renewing a taxicab franchise license. In that case, Los Angeles attempted to exercise its exclusive authority to issue the license to shift the balance power in the bargaining process. In another case, the state, as owners of the sewage treatment facilities to be built, could require bidders for the project to abide by labor agreement terms. The difference is the state or local government may pursue a purely proprietary interest since private parties in similar situations would be free to negotiate these terms and conditions.

Here, the City's prevailing wage policy applies only when the City is directly contracting with a third party for work or services i.e., when the City is acting as a "market participant." For example, prevailing wages apply when the City enters into a contract for the construction of a public works project. It also applies to certain services agreements entered into by the City. Since the City started providing residential solid waste services ("Recycle Plus") in 1993, the City has required prevailing wage for truck drivers. In the 2006 Recycle Plus RFP, Council also required material recovery facility sorters be paid prevailing wage.

Unlike the above situations, the City would be acting as regulator - and not as a market participant - by requiring that the successful proposer for the commercial solid waste servicer pay prevailing wage as a condition of a franchise. By contrast to Recycle Plus services, the City has not assumed the responsibility for providing solid waste services to commercial generators. Instead, the City grants franchises subject to regulations such as hours of service and franchise fees for the right to use City streets and to provide this service to San Jose businesses.

B. Federal labor law preemption

When acting as a market participant, the City has greater freedom from the limits of federal and state laws that would otherwise prohibit or preempt local regulation. The National Labor Relations Act ("NLRA") is a federal labor law that protects employers' and workers' right to collectively bargain to negotiate the terms and conditions of employment. State and local laws are preempted by the NLRA if they regulate areas covered by the NLRA or frustrate an area Congress intended to leave free to economic forces.

The Ninth Circuit has held that the NLRA preempts public entities from imposing prevailing wage requirements as part of a regulation because it interferes with an area Congress intended to leave to the free play of economic forces. The general rationale of these cases is that the prevailing wage rate for a particular class of employees is an averaged rate based on the rate negotiated by third parties in that locality. The pay rate for a specific class of employees is frequently established as part of negotiations that also include other issues, such as working conditions, job duties, and/or benefits, issues

that are unique to a particular work-place or specific job, and the imposition of prevailing wage could interfere with labor negotiations regarding these issues.

While two subsequent Ninth Circuit cases have found in favor of requiring prevailing wage for apprentices in public construction projects and apprentices hired from state approved programs for private construction projects, these cases were distinguished based on the facts.

Accordingly, when acting as a market participant, the City may include prevailing wage requirements in its agreements. However, if the City is acting in its regulatory capacity, preemption issues arise with regard to trying to impose a prevailing wage

II. Imposition of living wage

In the Environmental Services Department memo to Council, staff recommends requiring the exclusive franchisees pay their employees living wage. The City has the authority to impose such a requirement.

The "living wage," in contrast to the "prevailing wage," is a single wage rate – fixed at a level above the federal and state minimum wage requirements - applicable to certain designated workers within a geographic area. It is the minimum rate for meeting basic living expenses in the San Jose area. Moreover, the living wage is the same for all workers irrespective of their position or job duties.

Importantly, the NLRA does not preempt state and local governments from enacting minimum substantive labor regulation of general applicability which serve a broader public interest. For example, federal cases have held that the NLRA does not preempt minimum wage laws because they merely form the backdrop for labor negotiations. The Ninth Circuit has concluded that because "living wages" are so similar to minimum wage requirements, they too are not preempted by the NLRA. Accordingly, the City could include a living wage requirement in its franchises.

To impose such a requirement, the City would need to adopt an ordinance in its regulatory capacity to require that commercial franchisees pay living wage. The City also would need to amend its current living wage policy to eliminate the current exemption for franchises. The City could limit the application of living wage to exclusive commercial solid waste franchises (as opposed to more general application to all franchises or other sectors in the City), provided the City has a rational basis for doing so.

The City would likely be able to establish a rational basis. Unlike the City's practice with respect to other franchises, the City may limit the number of franchises that can provide solid waste services to only two or three companies. Moreover, the City recently adopted Green Vision and Zero Waste goals and in order to meet these goals, the City will need to redesign its solid waste systems and impose more regulations on the commercial solid waste franchisees. It is in the City's public interest to ensure that this basic mandatory public health service to businesses is not interrupted and qualified

employees provide the vital service. Finally, there is precedent in the residential solid waste service sector for requiring workers with commensurate job responsibilities, such as truck drivers, and material recovery facility workers at a dedicated facility, be paid at least a living wage.

III. Worker Retention

Council has also proposed requiring the successful franchisees to retain employees of the former hauling companies. While the majority of the approximately twenty (20) companies would continue to provide hauling services to construction and demolition debris generators, a few companies could lose the right to provide regular garbage service. The employee retention requirement in the City's living wage policy does not currently apply to franchises. In two federal reported cases from a District Court in New York and the D.C. Circuit Court, worker retention requirements imposed by cities were found not to be preempted by the NLRA because it did not interfere with the bargaining process. New York and the District of Columbia imposed worker retention requirements that were substantially similar to the City's policy. Additionally, the City's policy would allow the employer to hire the retained employees on the same terms for all its employees. However, the City would be under the jurisdiction of the Ninth Circuit and since the federal courts within the Ninth Circuit have not decided on the issue, it is unclear if such a requirement would be challenged.

CONCLUSION

The City has limited its application of prevailing wage requirements to those circumstances in which it is acting as a market participant. In the case of the commercial solid waste services it is not acting in that capacity. Consequently, it could be vulnerable to legal challenge if it acts as a regulator to impose a prevailing wage requirement in the RFP for exclusive commercial solid waste service franchisees. However, the City can require a living wage requirement as a regulator on franchisees in the City. Finally, worker retention requirements imposed by regulators have been upheld in other jurisdictions, which provides support for the City's approach to mandating worker retention to commercial solid waste servicers but may be subject to a legal challenge within our circuit.

RICHARD DOYLE
City Attorney

By 
ROSA TSONGTAATAR II
Deputy City Attorney